No. 661

In the

Supreme Court of the United States

OCTOBER TERM, 1947

A. PHILLIP RANDOLPH, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9350

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To the Honorable, the Supreme Court of the United States:

Petitioners' statement of the case is incomplete and in some respects is erroneous and misleading. For this reason respondents Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas set forth their own statement of the case.

OPINIONS BELOW

The opinion of the District Court is reported in *68 F. Supp. 1007*. The opinion of the Circuit Court is reported in *164 F. (2d) 4*, Pamphlet Advance Sheet No. 1, dated December 22, 1947.

STATEMENT OF THE CASE

Nature of the Suit

This is a suit for an injunction (Complaint, R. 2-16; Amended, R. 34-35, 74-75).

Jurisdiction is predicated upon diversity of citizenship and the requisite amount (R. 2).

The complaint was filed on June 24, 1946 (R. 16) by A. Phillip Randolph, International President of the Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants; other officers of the Brotherhood; William P. Orr and six other individuals; the above mentioned Brotherhood; and Local Train Porters Union No. 3 (R. 1), as a class action on behalf of a group known as "Train Porters", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

Defendants below were Missouri-Kansas-Texas Railroad Company, a Missouri corporation; Missouri-Kansas-Texas Railroad Company of Texas, a corporation of the State of Texas; E. R. Bryan, General Chairman of the Brotherhood of Railroad Trainmen on the lines of railroad operated by

the defendant railroad companies; other officers of the Brotherhood and its local lodges; and the Brotherhood of Railroad Trainmen (R. 1). It was alleged that the defendants, except the railroad companies, represent a group known as "Railroad Trainmen", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

The purpose of the suit is to compel the railroad defendants to continue using train porters, as well as other employees, in the performance of the following duties relating to train movements:

> "(1) Inspection of cars and trains and test signal and brake apparatus for safety of train movement;
>
> "(2) The use of hand and lamp signals for the protection and movement of trains and engines, including necessary flag protection on the head end of trains or through blocks;
>
> "(3) Opening and closing switches and derails for switching and for the movement of trains and engines en route, and at some terminals;
>
> "(4) Coupling and uncoupling cars and engines and the hose and chain and attachments thereof en route and at some passenger terminals;
>
> "(5) Pick up, set out, place and switch loaded and occupied passenger cars en route and at some passenger terminals;
>
> "(6) Read the Conductors train orders and familiarize himself with them to determine where opposing trains are to be met or passed and observe position of all order signals and see that train orders affecting the movement of trains are picked up en route" (R. 6, 13).

The railroad defendants filed a cross-claim against their co-defendants and the plaintiffs in this action seeking a judgment declaring, among other things, the rights and other legal relations and obligations of all of the parties (R. 87-93).

Factual Background

In order that the Court may fully understand the issues in this case, respondents set forth the essential facts antedating this litigation.

Conductors, brakemen, train porters, and other employees of the railroad defendants now perform and for many years have performed interchangeably for said defendants the work in controversy (R. 537-540).

Neither the current agreements (R. 229-234, 252-295) nor the former agreements (R. 225-229; Exhibits A to F to the Stipulation of Facts, omitted in printing, R. 220, 653-655) between the railroad defendants and their train porters, conductors and brakemen, specify who shall perform such work.*

By letter dated April 1, 1946 (R. 239-240), the Brotherhood of Railroad Trainmen protested the use by the railroad defendants of any employees other than brakemen in the performance of said work, stating:

> "Unless the practice of requiring or permitting these employees to perform brakemen's duties is discontinued within ten (10) days from the date of this

* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

letter, claim will be filed for each available brakeman on M-K-T Lines first out on extra board at time such train is run on which this service is performed by other than a qualified brakeman, on the same basis as though such brakeman was used to perform all of the brakemen's duties and work on such passenger trains" (R. 240-241).

Prior to making this protest, the Brotherhood of Railroad Trainmen had procured from the First Division of the National Railroad Adjustment Board four Awards on other railroads to the effect that those companies violated their agreements with the brakemen when they permitted train porters to perform work similar to the work now in controversy, to wit:

Award No. 5906, Docket 9898, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit X to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 5907, Docket 9899, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit Y to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 6640, Docket 7400, dated April 20, 1942, involving The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines (Exhibit W to Stipulation of Facts, not printed; R. 220, 223, 655); and

Award No. 7251, Docket 14777, dated September 3, 1942, involving The Texas and Pacific Railway Company (Exhibit Z to Stipulation of Facts, not printed; R. 220, 223, 655).

In Awards 5906, 5907 and 7251, the National Railroad Adjustment Board, without a Referee, sustained the com-

plaint or claim "without retroactive adjustment in compensation"; but in Award 6640*, the Board, by Referee James B. Riley, after holding that the use of porters violated the seniority rights of brakemen, declared:

> "It follows that protest and specific claim should be sustained. Claim that like settlement shall be made in all instances of similar nature now on file is likewise sustained" (page 18).

Confronted with these Awards and the positive declaration of the Brotherhood of Railroad Trainmen that claims would be filed if train porters continued to perform any of this work (R. 240-241), the railroad defendants decided to discontinue using train porters for this service. Accordingly, the railroad defendants gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156). The original date of May 16, 1946 (R. 242), on which said use of train porters was to have been discontinued, was postponed (R. 246) and later changed to June 30, 1946 (R. 250). The services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Proceedings in the District Court

The train porters commenced this suit on June 24, 1946 (R. 16). Among other things, it was alleged that the train porters, both by contract and custom, for more than sixty years (R. 7) have performed the work in controversy

* Enforcement temporarily enjoined on February 6, 1948; Appendix to Petitioners' Brief, page 58.

(R. 6). Plaintiffs also alleged that the railroad defendants, unless enjoined and restrained (R. 12), would take said work away from the train porters because of "fraud, duress, threats and undue influence" exerted and threatened to be exerted by the Railroad Trainmen (R. 5).

The train porters were fully informed of the claims which the Brotherhood of Railroad Trainmen had threatened to file against the railroad defendants (R. 10) and, in further support of their action, the train porters asserted that the Railroad Trainmen, unless restrained and enjoined, would "carry out the aforesaid threats", would "continue to bring pressure upon the railroad companies", and would "continue to subject them to such duress and threats that the railroad companies are helpless not to cancel said contract" (R. 12).

Upon the verified complaint (R. 2-16), the District Court granted a temporary restraining order on June 24, 1946, which declared:

> "That the Brotherhood of Railroad Trainmen and all the officers and members thereof, be restrained and enjoined from seeking to enforce their demands described in the complaint, by claims and suits against the railroad companies or otherwise, and be enjoined from interfering with the contractual relations between the Train Porters and the railroad defendants, and from in any manner seeking to cause the railroad companies to repudiate and violate the contract and custom described in the complaint" (R. 17); and
>
> "That the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and their agents, officers and representa-

> tives, be and they are hereby restrained and enjoined from violating the terms of the contract pleaded in the complaint, and of the agreed custom therein described, and are enjoined from disturbing the status of plaintiffs as it now exists under said contract and custom, and from taking from the plaintiffs the performance of the duties performed by the Trail (Train) Porters as described in said complaint, and be enjoined from complying with the demands of the Brotherhood of Railroad Trainmen in the premises" (R. 17).

In support of the temporary restraining order, plaintiffs posted a $500.00 bond (R. 18-19).

On September 10, 1946, the railroad defendants filed a motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). After hearing evidence on the motion (R. 199-210), the District Court handed down a Memorandum Opinion on October 28, 1946 (R. 634-639), directing counsel to prepare an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 639). In reaching this decision, the District Court was not guided by the evidence of damages which the railroad defendants might suffer or incur because of the temporary restraining order, as contemplated by Rule 65(c) of the Federal Rules of Civil Procedure, but by the Court's belief that plaintiffs were entitled to injunctive relief. The Court said:

> "In this case, upon the pleadings, upon the arguments of counsel, and upon all of the assumed facts, the plaintiffs are clearly and unquestionably entitled to a temporary restraining order and temporary injunction. A valid and subsisting contract held by them

is admittedly threatened and it is not denied but that they would suffer irreparable damage.

"In view of the admitted facts, the plaintiffs are not wrongfully enjoining the corporate defendants and the individual defendants. At this early stage of the proceeding, and upon the admitted facts, the plaintiffs have the undeniable right to restrain the abrogation or breach of their contract and to restrain the individual defendants from an endeavor to induce its abrogation or breach. Under such circumstances the plaintiffs ought not to be required to pledge additional security for damages that might and doubtless will accrue to the corporate defendants, but for which the plaintiffs would in no wise be responsible or at fault" (R. 639).

On November 9, 1946, the railroad defendants filed a motion (R. 61-68) to modify and vacate portions of the Memorandum Opinion dated October 28, 1946, pointing out the error of the District Court in refusing to increase the amount of the temporary restraining order bond solely because the Court was of the opinion that plaintiffs were entitled to an injunctive order (R. 66-68). In reply, the District Court on November 22, 1946, filed a Supplemental Memorandum Opinion (R. 640-646) to the effect that the amount of a bond is discretionary with the Court (R. 643) and that the motion to increase the bond should be denied because (1) the damages would have accrued without the issuance of the temporary restraining order (R. 644-645), and (2) a bond should not be required for the purpose of paying debts (R. 643). Consequently, the District Court erroneously held that:

"The statute and the rule providing the security in injunctive proceedings did not contemplate damages

of the character involved or discussed in this proceeding" (R. 645).

Accordingly, the District Court on November 30, 1946 (R. 75), entered an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 42-52) and their motion to modify and vacate portions of the Memorandum Opinion dated October 28, 1946 (R. 634-639).

By successive orders of the District Court (R. 19, 35, 75), the temporary restraining order was kept in effect until issuance of a temporary injunction on March 5, 1947 (R. 160-163) which followed hearings on January 20, 21, 22, 1947 (R. 86, 107, 210-633). The temporary injunction ordered and adjudged:

> "That the Brotherhood of Railroad Trainmen and all the members thereof now engaged in working for the defendant railroad companies be and they hereby are restrained and enjoined from seeking to enforce their said demands by claims and suits against the railroad companies, defendants; and they are further enjoined and restrained from coercing said railroad companies by threatening to file or by filing claims arising from the work performed by the plaintiffs; and they are further enjoined and restrained from interfering in any way whatever with the contractual relations, as above stated, between the Train Porters and the Railroad Companies, by inducing or coercing said Railroad Companies to repudiate, abrogate, cancel or violate their contract obligations with the plaintiffs, Train Porters" (R. 162-163); and
>
> "That the defendant railroad companies be and they hereby are temporarily enjoined and restrained from violating the terms of the contract hereinbefore

mentioned and from disturbing the status of the plaintiffs under said contract with all modifications thereof, including customs and habits indulged and approved; and the said railroad companies are enjoined from taking from the plaintiffs the performance of the duties heretofore rendered by them and now being rendered by them pursuant to said contract; and the said railroad companies are further enjoined from complying with or yielding to demands of the Brotherhood of Railroad Trainmen" (R. 162).

Also included in the temporary injunction was an order that:

"plaintiffs enter into an obligation in the way of security in the sum of Five Hundred ($500.00) Dollars for the payment of such costs and damages as may be incurred or suffered by any party who may have been found to have been wrongfully enjoined or restrained hereby, or that the bond or security heretofore given on the temporary restraining order to the same effect and for the same purposes be continued as security herein" (R. 163).

On March 20, 1947, the railroad defendants filed a motion to dissolve the temporary injunction (R. 170-175) on the grounds (1) that there is no legal basis for the injunction since no cause of action is either pleaded or proved against the railroad defendants (R. 171-172), and (2) the $500.00 bond, under the undisputed evidence, does not satisfy those provisions of Rule 65(c) of the Federal Rules of Civil Procedure which expressly prohibit the issuance of a temporary injunction unless and until the Court has required the applicant therefor to give security conditioned upon "the payment of such costs and damages as may be

incurred or suffered by any party" who may be found to have been wrongfully enjoined and restrained (R. 172-174).

Subject to their motion to dissolve, the railroad defendants also filed another motion on March 20, 1947, asking that the amount of the temporary injunction bond be increased from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect said defendants against the payment of such costs and damages as they might suffer or incur if they, or either of them, are found to have been wrongfully enjoined or restrained (R. 176-180).

The motion of the railroad defendants to dissolve the temporary injunction and their alternative motion to increase the amount of the temporary injunction bond were overruled on March 29, 1947 (R. 183).

Potential Damages

By letter dated April 1, 1946, the Brotherhood of Railroad Trainmen threatened to commence the filing of claims on behalf of individual brakemen if the railroad defendants did not, within ten days, discontinue using employees other than brakemen in the performance of the work in controversy (R. 239, 240-241).

Between April 11, 1946, and June 24, 1946, when this suit was filed and the temporary restraining order was issued (R. 16, 19), 688 claims totaling $6,447.00 had been filed against the railroad defendants (R. 540) and their potential liability for that period was $38,617.50 (R. 542).

A hearing was held on September 14, 1946 (R. 200) on the motion of the railroad defendants to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). According to the undisputed evidence, claims of the brakemen against the railroad defendants were then accruing at an approximate rate of $520.00 per day (R. 201). Subsequent to the hearing and before the Court ruled on the motion, a check of operations was made during the month of October 1946. It revealed that the claims of the brakemen were accruing at the rate of $514.90 per day (R. 73). An affidavit to that effect by A. F. Winkel, an officer for the railroad defendants (R. 72), was filed on November 16, 1946 (R. 73), fourteen days before the Court on November 30, 1946 (R. 75) overruled the railroads' motion to increase the amount of the temporary restraining order bond.

Had the temporary restraining order not been issued, the railroad defendants, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Because of the temporary restraining order, the railroad defendants continued to permit train porters, as well as other employees, to do the work. Claims of the brakemen are accruing on each day that train porters perform the work (R. 240-241, 208-209). At the rate of $514.90 per day, said claims totaled $78,779.70 for the period July 1, 1946, to November 30, 1946, when the Court overruled the motion to increase the amount of the temporary restraining order bond (R. 75).

Mr. Winkel was a witness at the hearing on plaintiffs' application for a temporary injunction on January 22, 1947 (R. 543). He testified that the railroad defendants were being subjected to a daily potential liability of $514.90 (R. 542). At that rate, said claims totaled $127,695.20 for the period July 1, 1946, to March 5, 1947, when the temporary injunction was issued upon plaintiffs' giving a $500.00 bond (R. 160-163), and they totaled $140,052.80 when the Court on March 29, 1947, overruled the motion of the railroad defendants to increase the amount of the temporary injunction bond (R. 183).

As a result of the issuance of the temporary restraining order and the temporary injunction, the potential liability of the railroad defendants will amount to $329,536.00 on March 31, 1948, and such potential liability thereafter will increase at the rate of $514.90 per day (R. 542).

Proceedings in the Circuit Court

Three appeals, Civil Actions Nos. 13564, 13565 and 13566, were prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit and were consolidated by order of that Court dated May 26, 1947.

In Civil Action No. 13564, the railroad defendants appealed (R. 156-157) from those portions of the order of the District Court dated November 30, 1946 (R. 74-75), which (a) overruled the railroads' motion to increase the amount of the temporary restraining order bond (R. 42-50), and (b) overruled the railroads' motion (R. 61-68) to modify and partially vacate the Memorandum Opinion of the District Court dated October 28, 1946 (R. 634-639).

In Civil Action No. 13565, the railroad defendants appealed (R. 187-189) from those portions of the order of the District Court dated March 5, 1947 (R. 160-163), which granted a temporary injunction against the railroads, and from the order of the District Court dated March 29, 1947 (R. 183), which (a) overruled the railroads' exceptions to the form of the temporary injunction (Original Record 187-193; Omitted in Printing, R. 649, 651-652), (b) overruled the railroads' motion to dissolve the temporary injunction (R. 170-175), and (c) overruled the railroads' alternative motion to increase the amount of the temporary injunction bond (R. 176-180).

In Civil Action No. 13566, the Brotherhood of Railroad Trainmen and other defendants in the District Court (R. 184-185) appealed from the order of March 5, 1947, which granted a temporary injunction against them (R. 160-163).

All appeals were presented on a single record.

In the Circuit Court the railroad appellants urged the following points:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".
>
> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".
>
> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the

issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

"4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction" (Brief, pages 20-23).

The opinion of the Circuit Court (R. 695-705) is reported in *164 Fed. (2d) 4-9*, Pamphlet Advance Sheet No. 1, dated December 22, 1947. In accordance with that opinion, the Court remanded the causes to the District Court with direction to dissolve the temporary injunction and for further proceedings in accordance with that opinion (R. 708). A petition for rehearing filed by the train porters (R. 709-713) was denied (R. 715); and on motion by the train porters (R. 715-716), the mandate was stayed pending application for a writ of certiorari (R. 718-719).

The Brotherhood of Railroad Trainmen and its officers contended in the Circuit Court, as they did in the District Court, that—

> "the facts pleaded as well as the facts shown in evidence in this case, disclose that the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act, 45 U. S. C. A. 151, et seq., and a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U. S. C. A. 101, et seq." [R. 698; *164 Fed. (2d) 6*].

The Brotherhood of Railroad Trainmen and its officers also contended,—

> "that the District Court should not have undertaken to interpret the agreements of the passenger train porters or of the railroad trainmen with the railroads for the purpose of settling by injunctional orders or decree, the dispute as to whether one or both of the two classes of employees, the train porters and the trainmen, should perform the work in question" [R. 698-699; *164 Fed. (2d) 6*]; and that,—

> "the court should have stayed exercise of its power to issue injunctional orders and should have relegated the parties to the tribunals specifically provided by Congress in the Railway Labor Act for mediation and for determining the interpretation and application of collective bargaining contracts such as are shown to be involved in this case, in order to finally settle the labor dispute arising out of them, and that the issuance of the temporary injunction in the first instance was erroneous" [R. 699; *164 Fed. (2d) 6*].

Sustaining these contentions, the Circuit Court held that,—

> "the issuance of the temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in Order of Railway Conductors v.

Pitney, 326 U. S. 561, 66 S. Ct. 322, 325, 90 L. Ed. 318" [R. 699; *164 Fed. (2d) 6*].

The Circuit Court also rejected the plea of the train porters that the injunction sought is not within the purview of the Federal Acts because the trainmen were guilty of "wrongful conduct amounting to tort, committed and threatened against the railroads to compel the railroads to breach or cancel their contracts with the porters". The Court stated that "examination of the record convinces that there was no substantial evidence tending to show that the defendant trainmen have committed or threatened any such actionable tort" [R. 701; *164 Fed. (2d) 7-8*].

The Circuit Court also ordered a dissolution of the temporary injunction against the railroad companies because:

> "* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads. *The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned.* Our conclusion that there was no tortious conduct on the part of the trainmen justifying the temporary injunction against them therefore necessitates that it be dissolved as to the railroads as prayed in their appeal" (Our italics) [R. 704-705; *164 Fed. (2d) 9*].

In this connection, the Circuit Court found:

> "The railroads were about to accede to the demands of the trainmen and intended, *after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156*, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" (Our italics) [R. 697-698; *164 Fed. (2d) 5-6*].

The Circuit Court thus sustained Points 1 and 2 urged by the railroad appellants, reading as follows:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".

> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".

But the Circuit Court did not pass upon said appellants' Points 3, 4, 5, and 6, to wit:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The net result is that the respondent railroad companies have been given a $500.00 bond to protect them against a potential liability of $329,536.00, as of March 31, 1948, which is increasing at the rate of $514.90 per day, solely as a result of the temporary restraining order and the temporary injunction which the Circuit Court has declared never should have been issued.

ERRONEOUS STATEMENTS AND INFERENCES BY PETITIONERS

As heretofore stated, petitioners have made some erroneous statements and inferences to which these respondents must except. Generally, they may be classified as follows:

(a) Statements to the effect that there was no conflict of evidence on any material issue covered by the findings of the District Court (pages 5, 21, 34);

(b) Statements to the effect that the train porters have performed the disputed work under a contract with the railroad companies and under a custom and

practice made a part of that contract (pages 5, 6, 7, 10, 19, 20, 21, 33, 37);

(c) Statements to the effect that the train porters would lose their jobs if they ceased to perform the disputed work (pages 7, 12, 19, 21);

(d) Statements to the effect that the railroad companies desire to continue a contract, custom and practice which entitle train porters to perform the work in controversy (pages 6, 10, 11, 20, 33, 37);

(e) Statements to the effect that there is no dispute between the railroad companies and the train porters as to the meaning, application and effect of the contract between said companies and their train porters (pages 9, 10, 11, 20, 33, 36);

(f) Statement to the effect that the railroad companies agree that the train porters have performed the disputed work under a contract and under a custom and practice made a part of that contract (page 33).

In support of these statements the train porters cite Findings of Fact II, III*, VIII, and X which they prepared (R. 108-113) and the District Court adopted (R. 134).

The evidence does not support those portions of Findings of Fact II and III, cited on pages 5 and 19, which recite that the train porters have performed the work in controversy pursuant to contract and custom between the train porters and the railroad companies. Furthermore, such findings are erroneous because they imply that train porters exclusively have performed the disputed work, while the evidence shows that such work has been performed interchangeably by train porters, conductors, brakemen, and

* Incorrectly shown by petitioners as Finding XXIII (page 19).

other employees of respondents (R. 528-531, 537-540). Respondents excepted to the findings on those grounds (R. 139, 140).

Finding of Fact VIII does not support the statements on page 20. Furthermore, this finding is not supported by the evidence if it is construed to mean that the train porters are entitled to perform the disputed work under their contract with respondents, or that respondents admit that any such right exists.

Finding of Fact X, cited on page 21, does not support the inference that the train porters will lose their jobs if they cease to perform the work in controversy. Furthermore, the evidence does not support the finding that many porters would lose their jobs in that event.

POINTS PRESENTED

I.

The Circuit Court correctly ordered a dissolution of the temporary injunction against the respondent railroad companies.

II.

The Circuit Court correctly held that the respondent railroad companies had and have the legal right to terminate their contract with the train porters and to negotiate a new contract which expressly excludes the work in controversy.

III.

This case does not involve any dispute which can be taken by the train porters either to the National Railroad Adjustment Board or to the National Mediation Board.

IV.

The membership of the National Railroad Adjustment Board, if biased as claimed by petitioners, affords no reason for review by this Court.

V.

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give security in a sum sufficient to protect the railroad companies from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

ARGUMENT

Preliminary Statement

These factors influenced the decision of the railroad companies to withdraw the work in controversy from their train porters:

1. Four Awards of the First Division of the National Railroad Adjustment Board against the Southern Pacific, Texas and Pacific, and Santa Fe, holding:

(a) That similar work belongs to brakemen;

(b) That the use of train porters, in the performance of such work, is a violation of the seniority rights of brakemen;

(c) That the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28).

2. The action of the First Division of the National Railroad Adjustment Board, by Referee James B. Riley, in sustaining against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18).

3. The positive threat of the Brotherhood of Railroad Trainmen to file similar claims against these respondents if they continued to use train porters in performing the disputed work (R. 240-241, 207-209, 615).

4. The decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561*, in which it was held that the National Railroad Adjustment Board should construe the contracts of two opposing unions and decide which group of employees should perform the disputed work.

5. The holding of this Court that an award of the National Railroad Adjustment Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721*, and the tendency of this Court to sustain an award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567*.

6. The inability of these respondents to initiate an action testing the validity of an adverse award because the right of review, at the instigation of a railroad company, is not granted by the Railway Labor Act, *Washington Terminal Co. v. Boswell, 124 Fed. (2d) 235, 240;* affirmed by divided Court, *319 U. S. 732.*

7. The knowledge that the Brotherhood of Railroad Trainmen would resort to a strike vote to enforce an award against these respondents (R. 619), as it did in the Southern Pacific case (R. 617-618), instead of suing on the award as contemplated by the Railway Labor Act [45 U. S. C. A. Sec. 153(p)].

Argument Under Points I and II.

Point I—(Restated)

The Circuit Court correctly ordered a dissolution of the temporary injunction against the respondent railroad companies.

Point II—(Restated)

The Circuit Court correctly held that the respondent railroad companies had and have the legal right to terminate their contract with the train porters and to negotiate a new contract which expressly excludes the work in controversy.

Points I and II are related and will be considered together.

Neither the agreement between these respondents and their train porters (R. 229-234) nor the agreement be-

tween respondents and their brakemen (R. 252-295) specify who shall perform the work in controversy* although each group bases its claims upon those respective agreements. Therefore, having concluded to withdraw such work from the train porters, for the reasons stated in the foregoing preliminary statement, these respondents gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act [45 U. S. C. A. Sec. 152 Seventh and Sec. 156].

The Railway Labor Act is part of Title 45 of the United States Code Annotated. Section 152 Seventh of that Title reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title".

It is clear from this statute that the respondent railroad companies were authorized to withdraw the disputed work from the train porters, even though the right to such work were embodied in an agreement—which is denied, provided such withdrawal was made either in accordance with the train porters' agreement or in accordance with the provisions of Section 156 of Title 45.

The current agreement with the train porters became effective December 1, 1928 (R. 229). The second para-

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* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

graph of Article XI of that agreement reads in part as follows:

> "These rules and regulations shall remain in full force and effect * * * until written fifteen (15) days' notice is served, setting forth any change that is desired by either the railway or employes, and a hearing will be given within fifteen (15) days after receipt of notice" (R. 233-234).

Section 156 of Title 45 of the Code reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board".

As heretofore stated, these respondents gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act.

By telegram dated April 12, 1946 (R. 241), these respondents notified T. D. McNeal, representative of the

train porters (R. 466-467), that the Brotherhood of Railroad Trainmen was protesting the use of train porters to perform the work in controversy. By letter dated April 15, 1946 (R. 242), respondents notified McNeal of their intention to cancel the train porters' agreement effective May 16, 1946, and to negotiate a new agreement. A conference was arranged for May 4, 1946 (R. 244) but postponed to and held on May 7, 1946 (R. 245, 246). No agreement was reached, the conference was adjourned, and the effective date for cancellation of the agreement was postponed (R. 246). Another conference was held on May 22, 1946, and adjourned to a later date to be mutually agreed upon (R. 248). The final conference was held on June 7, 1946 (R. 250). Verbally and by letter of that date, respondents notified the train porters that the agreement would be cancelled at midnight on June 30, 1946, and that respondents were willing to negotiate another agreement which would expressly exclude the work in controversy (R. 250-251). Services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Having complied with the terms of the train porters' agreement (R. 233-234) and with the provisions of the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156) these respondents had the legal right to cancel the train porters' agreement at midnight on June 30, 1946, and thereafter to negotiate a new agreement with the train

porters which would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 F. (2d) 5-6*].
>
> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 F. (2d) 9*].

The porters do not challenge this right of respondents. They merely contend that the right should not be exercised because the action of respondents has been induced by the wrongful acts of the trainmen. This affords no basis for the temporary injunction against the railroad companies.

Argument Under Points III and IV.

Point III—(Restated)

This case does not involve any dispute which can be taken by the train porters either to the National Railroad Adjustment Board or to the National Mediation Board.

Point IV—(Restated)

The membership of the National Railroad Adjustment Board, if biased as claimed by petitioners, affords no reason for review by this Court.

Points III and IV are related and will be considered together.

For the reasons stated in the preceding argument under Points I and II, and as found by the Circuit Court, these respondents had the legal right to cancel their contract with the train porters and to negotiate a new contract which expressly excluded the work in controversy [R. 697-698, 705; *164 F. (2d) 5-6, 9*]. This being so, there is no dispute to be taken to the National Railroad Adjustment Board. The sole question, as between respondents and their porters, is whether or not respondents should be enjoined from exercising this right because their action has been induced by the alleged wrongful acts of the trainmen. This is purely a question of law which only the courts can answer. Power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board. The Circuit Court erred, therefore, in holding that "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 F. (2d) 7*], and the Circuit Court erred in sending the parties to the National Railroad Adjustment Board under the doctrine announced by this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 699-701; *164 F. (2d) 6-7*]. The *Pitney case*, as well as the Southern Pacific, Texas and Pacific, and Santa Fe cases before the Adjustment Board [Footnotes: R. 700; *164 F. (2d) 7*], merely involved the proper interpretation of conflicting agreements. In none of those cases, as in this case, had the railroad companies,

"after due notice and in accord with the provisions of the Railway Act" [R. 698; *164 F. (2d) 6*], sought to cancel one contract and to negotiate a new contract expressly eliminating the work in controversy. These facts distinguish the *Pitney case*, and the other cases, from the case at bar and show why there is no present dispute within the jurisdiction of the National Railroad Adjustment Board. This being so, it is immaterial whether or not the members of that Board are biased as alleged by the train porters and such allegations afford no reason for review by this Court.

Furthermore, there is no dispute or controversy which the train porters can take to the National Mediation Board. As shown in the preceding argument under Points I and II, respondents sought to cancel the agreement with their train porters and to negotiate a new agreement expressly excluding the work in controversy both "in the manner prescribed in such agreement" and under Section 156 of Title 45—the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh). Changes made as provided in an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It follows that the train porters have no right to resort to the National Mediation Board.

Argument Under Point V.

Point V—(Restated)

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give security in a sum sufficient to protect the railroad companies from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

The insufficiency of the temporary restraining order bond and the temporary injunction bond was urged before the Circuit Court in Points 3, 4, 5 and 6 reading as follows:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".
>
> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".
>
> "5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The Circuit Court did not pass upon these points. Except to state that respondents complained of the terms upon which the temporary injunction was issued [R. 704; *164 F. (2d) 9*], that Court made no reference to the inadequacy of the temporary restraining order bond and the temporary injunction bond. The Court, however, did make this general observation:

"* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads" [R. 704-705; *164 F. (2d) 9*].

Regardless of the reason for the temporary restraining order and the temporary injunction against these respondents, they were and are entitled to the protection contemplated by Rule 65(c) of the Federal Rules of Civil Procedure. This has been denied them in the instant case.

Had the temporary restraining order and the temporary injunction not been issued, these respondents, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Be-

cause of the temporary restraining order and temporary injunction, respondents have continued to permit train porters, as well as other employees, to do such work. Claims of the brakemen are accruing on each day that train porters perform the disputed work (R. 240-241, 208-209).

Amount of Potential Damage

The evidence as to the amount of respondents' potential liability is undisputed.

By letter dated April 1, 1946, the Brotherhood of Railroad Trainmen threatened to commence the filing of claims on behalf of individual brakemen if the railroad defendants did not, within ten days, discontinue using employees other than brakemen in the performance of the work in controversy (R. 239, 240-241).

Between April 11, 1946, and June 24, 1946, when this suit was filed and the temporary restraining order was issued (R. 16, 19), 688 claims totaling $6,447.00 had been filed against the railroad defendants (R. 540) and their potential liability for that period was $38,617.50 (R. 542).

A hearing was held on September 14, 1946 (R. 200) on the motion of the railroad defendants to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). According to the undisputed evidence, claims of the brakemen against the railroad defendants were then accruing at an approximate rate of $520.00 per day (R. 201). Subsequent to the hearing and before the Court ruled on the motion, a check of operations was made during the month of October 1946. It revealed that the claims of the brakemen were accruing

at the rate of $514.90 per day (R. 73). An affidavit to that effect by A. F. Winkel, an officer for the railroad defendants (R. 72), was filed on November 16, 1946 (R. 73), fourteen days before the Court on November 30, 1946 (R. 75) overruled the railroads' motion to increase the amount of the temporary restraining order bond. As of that date, the claims accruing since July 1, 1946, totaled $78,779.70.

Mr. Winkel was a witness at the hearing on plaintiffs' application for a temporary injunction on January 22, 1947 (R. 543). He testified that the railroad defendants were being subjected to a daily potential liability of $514.90 (R. 542). At that rate, said claims totaled $127,695.20 for the period July 1, 1946, to March 5, 1947, when the temporary injunction was issued upon plaintiffs' giving a $500.00 bond (R. 160-163), and they totaled $140,052.80 when the Court on March 29, 1947, overruled the motion of the railroad defendants to increase the amount of the temporary injunction bond (R. 183).

As a result of the issuance of the temporary restraining order and temporary injunction, the potential liability of the railroad defendants will amount to $329,536.00 on March 31, 1948, and such potential liability thereafter will increase at the rate of $514.90 per day (R. 542).

Damages May Be Incurred or Suffered by Respondents

In resisting an adequate bond in the Circuit Court, the train porters asserted that the claims of the brakemen are "fantastic" and "ridiculous" and that respondents "have full opportunity for judicial review of any order made

by the Adjustment Board" (Train Porters' Brief, pages 58-59). Unfortunately, the National Railroad Adjustment Board and the Courts do not share these views.

As above stated, the First Division of the National Railroad Adjustment Board, in four Awards against the Southern Pacific, Texas and Pacific, and Santa Fe, has held (a) that work similar to that now in controversy belongs to brakemen, (b) that the use of train porters in the performance of such work is a violation of the seniority rights of brakemen, and (c) that the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28). And in one of those Awards (Exhibit W) the Board, by its labor members and Referee James B. Riley, sustained against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18). The claims against the Santa Fe in that case were as "fantastic" and as "ridiculous" as the claims which the brakemen have asserted and will assert against respondents but that did not deter the Referee and the labor members of the Board. Acting for the Board, as a majority, those gentlemen entered an Award sustaining a claim for each of five men in excess of 300 miles, or a day's pay, because each of them on only one occasion handled the switches and gave the signals necessary to place their respective trains in side tracks (Exhibit W, pages 2, 18). In addition, as above stated, the Board in that Award likewise sustained the claim "that

like settlement shall be made in all instances of similar nature now on file" (page 18). In view of that Award, it is more than idle for the train porters to brand as "fantastic" the claims filed and which will be filed against respondents, and for the train porters to term "ridiculous" the idea that respondents "would have to pay a full day's wage to a Trainman, who was not there, because a Porter threw a switch on a designated run" (Train Porters' Brief, page 58).

But, declared the train porters, respondents "have full opportunity for judicial review of any order made by the Adjustment Board, with respect to any of these claims" (Train Porters' Brief, pages 58-59). This statement is not supported by the decisions.

The Railway Labor Act provides that the division of the Adjustment Board which makes an Award in favor of a petitioner,—

> "shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named" [45 U. S. C. A. Sec. 153(o)].

The Act also provides that if the carrier does not comply with said order, "the petitioner, or any person for whose benefit such order was made" may file suit to enforce the same, in which event the findings and order of the division of the Adjustment Board "shall be prima facie evidence of the facts therein stated" [45 U. S. C. A. Sec. 153(p)]. Construing this statutory provision, the United

States Circuit Court of Appeals for the District of Columbia by Associate Justice Rutledge, who is now an Associate Justice of this Court, declared that "The Act permits, but does not require, the employee to bring an enforcement suit", *Washington Terminal Co. v. Boswell, 124 F. (2d) 235, 242, footnote 13;* affirmed by divided Court, *319 U. S. 732.* This holding was made despite the argument of the Terminal Company that its employees would "elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards" and that thereby the Terminal Company would be "deprived of its day of defense, and so of its only day in Court" [*124 F. (2d) 246*]. In disposing of this phase of the case, the Circuit Court pointed out that this was an "unsupported and argumentative assertion" (page 246), but concluded:

> "Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise. That it has done, as the results attest. The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined. Whether such action would be lawful or unlawful, the mere possibility that employees may resort to it rather than to suit is not enough to make the latter inadequate constitutionally as protection for the carrier's rights. The weight of that possibility is properly within the discretion of Congress in determining whether the initiative in litigation shall be given to one party or the other, particularly where as here it has given no final or conclusive effect, as against the party put upon

> the defensive, to the cause of action to be asserted. The fact that one party to a dispute which is litigable may undertake to settle it illegally does not render a legal remedy, adequate within itself, inadequate [*124 F. (2d) 247*].

This opinion may explain why the Brotherhood of Railroad Trainmen was emboldened to resort to a strike vote on the Southern Pacific to enforce the above mentioned Awards against that Company (R. 617-618, Exhibit X and Y to Stipulation of Facts, not printed; R. 220, 223, 655), and why the witness for the Brotherhood of Railroad Trainmen in this case frankly admitted that the Brotherhood would resort to a strike vote against respondents to enforce any Award which might be rendered against them (R. 619).

The Circuit Court in the *Terminal Company case* went further. It declared that the method of review provided in the Railway Labor Act "was intended to be exclusive" [*124 F. (2d) 240*]; it would not permit the Terminal Company to test the validity of the Award by declaratory judgment (page 251); and it announced the principle that "a carrier, consistently with the Railway Labor Act", cannot "maintain a suit in equity to set aside an Award or enjoin its enforcement" (page 251).

It is obvious from the foregoing that respondents do not have, as contended by the train porters, "full opportunity for judicial review of any order made by the Adjustment Board, with respect to any of these claims" (Train Porters' Brief, page 59). But suppose they did. What

chance would respondents have to set aside the order? Again we quote from the *Terminal Company case:*

> "The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony" [*124 F. (2d) 241*].

These quotations from the *Terminal Company case* show the difficulty, if not impossibility, of setting aside an award or order of the National Railroad Adjustment Board. Furthermore, if court review were possible, the chances of overturning an award or order would be ex-

tremely remote because this Court has held that an Award of the Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721,* and because of the tendency of this Court to sustain an Award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567.*

It is clear from the foregoing that the possibility of respondents being required to pay the claims which have been filed and which will be filed against them by the brakemen is neither speculative nor remote. On the contrary, the District Court found that such damages "might and doubtless will accrue to the corporate defendants" (R. 639). This being so, the District Court and the Circuit Court erred in failing or refusing to require the train porters to give respondents security for the payment of such damages, which approximate $514.90 per day for each day since June 30, 1946 (R. 73, 542), the date on which respondents would have discontinued using train porters in the performance of the work in controversy except for the temporary restraining order and temporary injunction which have been issued in this case.

WHEREFORE, if said petition for a writ of certiorari be granted, respondents pray that the Court affirm the judgment of the Circuit Court which ordered a dissolution of the temporary injunction against these respondents; that the Court declare that there is no dispute between respondents and their train porters which can be taken either to the National Railroad Adjustment Board

or to the National Mediation Board; that the Court overrule the action of the District Court and of the Circuit Court in refusing and failing to require the train porters to give adequate security as required by Rule 65(c) of the Federal Rules of Civil Procedure; that the Court enter an order requiring the train porters to give such security; and for all other and further relief to which respondents may be entitled.

Dated March 24, 1948.

Respectfully submitted,

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